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IN THE

Supreme Court of the United States

October Term, 1988

ROBERT L. MUSTO, *et al.*,

Petitioners,

vs.

AMERICAN GENERAL CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") erred in holding that the terms of the written employee welfare benefit plan sponsored by Respondents will be the primary determinant of Petitioners' benefits under the plan.

2. Whether the Court of Appeals committed reversible error by applying a uniform body of federal common law developed under the Employee Retirement Income Security Act of 1974 ("ERISA"), rather than state insurance law, to interpret the terms of the employee welfare benefit plan sponsored by Respondents.

STATEMENT OF CORPORATE AFFILIATES PURSUANT TO SUPREME COURT RULE 28.1

See Appendix.

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STATEMENT OF THE CASE

In 1945, the National Life and Accident Insurance Company ("NLA") established a medical benefits program for its employees (Ptnr. Apx. A, A-1).[1] The medical benefits program provided employees with reimbursement for specific types of medical expenses up to specified dollar amounts. Subject to a maximum lifetime benefit of $500 for all medical expenses, the program provided medical expense reimbursement to retirees.

During the next 40 years, the program was amended several times (Ptnr. Apx. A, A-2). Sometimes employees and retirees were required to make contributions in order to receive coverage under the program and sometimes they were not.[2] Id. The numerous changes in the coverage provided to both active employees and retirees were made pursuant to an expressly reserved right to modify or terminate the program in NLA's sole discretion.[3] (Ptnr. Apx. A, A-2). This express reservation appeared in the master plan documents and in the numerous booklets and certificates distributed to Petitioners over the years. (Ptnr. Apx. A, A-2, A-7, A-8, A-10, A-11, A-13, A-14,

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[1] References herein to "Ptnr. Apx." are to the Appendix filed with the *Petition for a Writ of Certiorari* and are followed by the page number of the cited text.

[2] Petitioners, in the first of several incorrect "factual" statements appearing in their Statement of the Case, allege that the "company paid for it [the medical coverage]." *Petition for a Writ of Certiorari*, (hereinafter "Petition") p. 3. In fact, the record clearly shows that contributions were required of both active employees and retirees from time to time. Because Petitioners do not ask the Court to review the factual findings of the Court of Appeals, they are not free to ignore them in their Statement of the Case.

[3] Petitioners allege as fact that "Respondents never claimed the right to reduce the benefits of employees who had already retired." (Petition p. 3). Once again, Petitioners ignore the record. The Court of Appeals found just the opposite (Ptnr. Apx. A, A-2, A-6, A-7, A-8). Even the District Court, which held in Petitioners' favor, found that, "[t]he termination/modification clause contained in the NLT/NLA summary plan descriptions, clearly and expressly reserve (sic) the right to amend or terminate the medical insurance benefit plan." (Ptnr. Apx. B, A-62).

A-16, A-17). The changes generally resulted in benefit improvements and, by 1984, a Petitioner who retired under the 1945 program had seen the ceiling on his post-retirement coverage increased from $500 to $100,000.[4]

In 1982, Respondent American General Corporation acquired NLA and in 1984, NLA's employee benefit programs were modified to conform to the programs provided by American General Corporation to its employees and employees of its other subsidiaries. (Ptnr. Apx. A, A-2). The changes included reductions (for example, required contributions) and improvements (for example, a doubling of the ceiling on post-retirement coverage to $200,000).[5]

Claiming that Respondents could only change their post-retirement medical coverage for the better, and that all the prior improvements in coverage made after their retirement were vested, Petitioners sued in the United States District Court for the Middle District of Tennessee ("District Court") to enjoin the 1984 changes.[6] The District Court, relying on the

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[4] At the commencement of this action, there was a small number of Petitioners who retired under the 1945 plan. Many more retired when maximum limits of $5,000, $10,000, and $25,000 were in effect.

[5] In an apparent attempt to obtain the Court's sympathy, Petitioners distort the record by arguing that "Respondents terminated the medical insurance for retirees who were unable to pay the required premium contributions. For many retirees, the contributions were more than the pension they received." (Petition p. 3.) This allegation finds no support in the record. The two witnesses Petitioners presented who did not elect coverage both testified that they elected not to enroll because they had better coverage elsewhere. The District Court found that "it could not determine how many [Petitioners] chose not to enroll because the cost was prohibitive." (Ptnr. Apx. B, A-46).

[6] As the Court of Appeals noted, "[r]egardless of when they had retired, the Plaintiffs sought to freeze their medical insurance coverage at the configuration that applied to them on June 30, 1984." (Ptnr. Apx. A, A-3). Approximately 70% of the Petitioners retired before the plan they seek to reinstate became effective. These Petitioners want to benefit from the pre-1984 modifications to their retiree medical coverage (which they liked) and

state law doctrine of unilateral contract espoused in *In re White Farm Equipment Co.*, 42 Bankr. 1005 (N.D. Ohio 1984), *rev'd*, 788 F.2d 1186 (6th Cir. 1986), found that the modification/termination clause in the plan documents was unenforceable unless plan modification was necessary to prevent insolvency. (Ptnr. Apx. B, A-65). Based upon this holding, the District Court issued a preliminary injunction restraining Respondents from making any further changes in the post-retirement medical program. (Ptnr. Apx., A, A-34).

Respondents appealed and, on November 15, 1989 "after a careful search of the record," the Court of Appeals reversed the District Court, finding that Petitioners had failed to establish the requisite probability of success on the merits of their claims.[7] (Ptnr. Apx. A, p. A-33). Specifically, the Court of Appeals found that Respondents had clearly and consistently reserved the right to modify the post-retirement coverage in

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claim the modification clause is not enforceable for the 1984 changes (which they did not like).

[7] In yet another mischaracterization of the Court of Appeals' decision, Petitioners allege, "The Sixth Circuit determined that as a matter of law .... [b]ecause ERISA does not require vesting of welfare plans, an employer may change or terminate those plans at any time for any reason no matter what the reasonable expectations of the Retirees" (Petition, p. 4). On the contrary, the Court of Appeals devoted no less than 15 pages of its opinion (Ptnr. Apx. A, A-9 through A-23) to an exhaustive analysis of the Petitioners' reasonable expectations based on information given to Petitioners concerning their coverage. The Court of Appeals concluded:

> Nowhere in that or any other employee publication — or in any memorandum, letter, brochure, report, or other written document, as far as we have been able to ascertain after a careful search of the record — did the company ever promise any employee that all premiums for post-retirement medical coverage would be irrevocably "paid up" upon the employee's retirement. (Ptnr. Apx. A, A-21).
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> Nowhere in the district court's opinion is there a specific finding that any National Life employee received an oral promise that his post-retirement medical insurance coverage would be permanently, irrevocably, and fully "paid up." (Ptnr. Apx. A, A-23).

the master plan documents (insurance policies) and in the many written communications issued to Petitioners describing the program. (Ptnr. Apx. A, A-2, A-7, A-8, A-10, A-11, A-12, A-13, A-16, A-17, A-19, A-21, A-23). Moreover, the Petitioners' coverage had been modified several times in the past by Respondents without objection in accordance with this reserved right. (Ptnr. Apx. A, A-2).

SUMMARY OF ARGUMENT

Petitioners ask this Court to review the Court of Appeals' decision for the purpose of considering adoption of a common law vesting rule which would prevent the sponsor of a retiree medical benefit plan from ever changing the coverage provided to any retiree regardless of whether the plan's written terms permit changes and regardless of whether the plan has been changed in the past in accordance with its terms.[8] Petitioners also urge the Court to grant *certiorari* and find that the Court of Appeals erred by failing to apply a "doctrine of reasonable expectations" alleged to exist under state insurance law in interpreting the documents governing the retiree medical benefit plan. (Petition p. 11).

The Petition should be denied because it raises none of the considerations governing review on *certiorari*. U.S. Sup. Ct. R. 17.

With respect to Petitioners' advocated common law vesting rule, the decisions of the United States Courts of Appeals are in complete accord. Every circuit that has been asked to adopt the rule has rejected it.[9] Similarly, there is no important question of federal law to be settled by this Court because the basic premise of Plaintiffs' argument — that the Court of Appeals' construction of ERISA destroys preexisting em-

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[8] Although Petitioners disguise their common law vesting rule as the "doctrine of unilateral contract" (Petition, p. 6), it is nothing more than a mandatory vesting rule for retiree medical plans.

[9] No conflict with a state court of last resort or with the prior decisions of this Court is alleged and none exists. U.S. Sup. Ct. R. 17.1.

ployee rights — is false. There was no pre-ERISA common law or statutory rule applicable to Petitioners or the public generally which prohibited modification of a post-retirement medical program. Even if there was, Congress answered the question Petitioners now submit to this Court by explicitly excepting medical benefit plans from the plans subject to ERISA's vesting requirements and by broadly preempting the state law upon which Petitioners base their arguments.

With respect to Petitioners' assertion that the Court of Appeals' decision conflicts with other circuits because it did not apply insurance law in interpreting the plan, this argument is made for the first time in the Petition and is simply a plea for this Court to reconsider the factual findings of the Court of Appeals.[10] There is no conflict among the circuits over the application of state insurance law to interpret medical benefits plans under ERISA. Morecover, the Court of Appeals' extensive factual findings, which are not reviewable absent gross error, conclusively establish that Petitioners could never have *reasonably* expected what they now demand.

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[10] Petitioners argued below that the federal common law would control their entitlement to benefits. They have never before argued that state insurance law should apply in construing the terms of the plan documents. The District Court held that all Petitioners' state law claims (which did not include insurance law claims) were preempted. (Ptnr. Apx., A, A-53). This holding was not disputed by Petitioners on appeal. Having lost under the federal common law they advocated, Petitioners now ask this Court to give them an opportunity to prove their case under state insurance law.

"Ordinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 45 U.S. 231, 234 (1976); *See also United States v. Mendenhall*, 446 U.S. 544, 551-52 n. 5 (1980); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (question presented in petition but not in court of appeals is not properly before the Court).

REASONS FOR DENYING THE WRIT

I. PETITIONERS' ADVOCATED COMMON LAW VESTING RULE FOR RETIREE MEDICAL PLANS DOES NOT RAISE AN ISSUE REQUIRING THE COURT'S REVIEW.

A. There Is No Conflict Among the Courts of Appeals over the Application of a Common Law Vesting Rule to Retiree Medical Plans.

The Courts of Appeals are unanimous in their rejection of the common law vesting rule advocated by Petitioners. *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d. 488, 491 (2d Cir. 1988) ("Automatic vesting does not occur in the case of welfare plans"); *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1516 (8th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3565 (U.S. Feb. 27, 1989) (No. 87-2022) ("welfare benefits do not automatically vest as a matter of law"); *DeGeare v. Alpha Portland Indus., Inc.*, 837 F.2d 812, 815 (8th Cir. 1988), *vacated on other grounds*, 57 U.S.L.W. 3565 (U.S. Feb. 27, 1989) (No. 87-2070) (*Accord* with *Anderson v. Alpha-Portland Indus., Inc.*); *Anderson v. John Morrell & Co.*, 830 F.2d 872, 876 (8th Cir. 1987), (*Accord* with *DeGeare*); *Molnar v. Wibbelt*, 789 F.2d 244, 250 (3d Cir. 1986) ("Unlike rights to pension benefits, rights to welfare benefits do not automatically vest as a matter of law"); *In re White Farm Equip. Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986) ("we discern no basis for finding mandatory vesting in ERISA of retiree welfare benefits"); *International Union, U.A.W. v. Cadillac Malleable Iron Co.*, 728 F.2d 807, 808 (6th Cir. 1984) ("we agree . . . that there is no legal presumption [of vested benefits] based on the status of retired employees"); *International Union, U.A.W. v. Yard-Man, Inc.* 716 F.2d 1476, 1479 (6th Cir. 1983), *cert. denied*, 456 U.S. 1007 (1984) ("[T]he court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent"); *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 330-331 (3d Cir. 1984) (Collective bargaining agreement contained no language suggesting re-

tiree welfare benefits would continue beyond the life of the agreement; therefore, retirees are not entitled to vested lifetime benefits); *Turner v. Local Union 302 Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1225, n. 5 (9th Cir. 1979) ("Pension plans must meet . . . vesting requirements . . . while welfare plans do not have to do so").

In the face of this overwhelming authority, Petitioners point to only two federal cases supporting their common law vesting rule; *In re Erie Lackawanna Ry*, 548 F.2d 621 (6th Cir. 1977) (applying Ohio law) and *In re White Farm Equipment Co.*, 42 Bankr. 1005. However, both of these cases arose in the Sixth Circuit and were overruled and reversed respectively by the Sixth Circuit's decisions in *In re White Farm Equipment Co.*, 788 F.2d 1186, 1192 (6th Cir. 1986) and in this case (Ptnr. Apx. A, A-18).

If Petitioners disagreed with the Court of Appeals' treatment of *In re Erie Lackawanna Ry.*, they should have petitioned for rehearing. They did not. The Supreme Court does not sit to resolve alleged inconsistencies between the decisions of a Court of Appeals or decide whether the Court of Appeals should have overruled one of its prior decisions. U.S. Sup. Ct. R. 17.1; *Davis v. United States*, 417 U.S. 333, 340 (1974).

B. Petitioners' Advocated Common Law Vesting Rule for Retiree Medical Plans Never Existed Before ERISA; Therefore, the Petition Raises No Question of a Conflict with ERISA.

1. No Pre-ERISA Case Gives Retired Employees the Right to Veto Modifications in Their Medical Plan Where the Employer Has Reserved the Right to Make Such Modifications.

Petitioners' argument for *certiorari* is founded on a superficially appealing syllogism. The first premise is that, under pre-ERISA law, Petitioners had a legal right to veto the changes in the medical plan sponsored by Respondents regardless of the plan's written terms. The second premise is that

ERISA is a remedial statute designed to expand the rights of employees. It follows, assert Petitioners, that the Court of Appeals' holding (the plan documents control) is in conflict with ERISA and the courts should establish an automatic vesting rule for medical benefits under ERISA.

However Petitioners' syllogism suffers from a critical flaw: there is not a single pre-ERISA case which has ever given a retired employee a vested interest in an employer sponsored medical plan in the face of an explicitly reserved amendment right in the governing plan documents.[11]

Indeed, none of the three pre-ERISA state law cases cited by Petitioners as evidence of their advocated medical benefits vesting rule even involved medical benefits.[12] To argue that retiree medical benefits could not be changed before ERISA regardless of the governing plan's terms based upon three state law cases, none of which even involved a medical plan, exceeds the bounds of reason and logic. The Supreme Court

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[11] Respondents have located only one pre-ERISA case (not cited by Petitioners) in which an employer was restrained from terminating or modifying a retiree medical plan. There, the Ohio Supreme Court held in a one-page *per curiam* affirmance that an employer could not terminate post-retirement medical coverage. *Sheehy v. Seilon, Inc.*, 227 N.E.2d 229 (Ohio 1967). However, there was no evidence that the employer had reserved the right to terminate coverage in *Sheehy*.

[12] *In re Erie Lackawanna Ry.*, 548 F.2d 621 (6th Cir. 1977) involved claims by former employees of a bankrupt employer for life insurance benefits. The court held the employees' claims were not entitled to administrative priority and the plan was terminated. Similarly, *Melin v. Northwestern Bell Tel. Co.*, 266 N.W.2d 183 (Minn. 1983) addressed whether an alcoholic was entitled to a disability pension under his employer's plan. The court held that alcoholism did not constitute a disability and denied recovery to the former employee. Finally, *Schlosser v. Allis-Chalmers Corp.*, 271 N.W.2d 879 (Wis. 1978) also involves the termination of a group life insurance plan. Life insurance and disability annuity benefits are distinguishable from medical benefits because the benefit liabilities are limited and readily ascertainable. See footnote 13 *infra*.

does not sit to review questions that are not raised by either the law or the facts.

2. Petitioners' Reliance on the Unilateral Contract Doctrine Applicable to Pension Plans Before ERISA is Inappropriate.

To bolster their claim of a conflict between the Court of Appeal's decision and ERISA, Petitioners have attempted to develop from pre-ERISA state law cases involving pension plans a fictitious legal doctrine applicable to medical plans. Petitioners cite *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1 (1st Cir. 1978), *cert. denied*, 440 U.S. 913 (1979) as the leading case establishing that pre-ERISA law uniformly vested pension and medical benefits at retirement under the unilateral contract theory. Yet *Hoefel* is a case that deals exclusively with the termination of *pension* plans and the *Hoefel* court relied on ERISA in reaching its decision. Acknowledging that ERISA was inapplicable, the court nonetheless called ERISA "an expression of national policy" and held that its construction of state law was confirmed by:

> the concerns motivating Congress to enact ERISA in 1974 . . . *See* H. Rep.No. 93-807, 93d Cong., 2d Sess., 3 U.S. Code Cong. & Admin. News, pp. 4760, 4676 (1974); S. Rep. No. 93-127, 93d Cong., 2d Sess., 3 U.S. Code Cong. & Admin. News, pp. 4841-42 (1974).

Id. at 6.

Of course, as we see below, in enacting ERISA, Congress consciously chose for sound policy reasons to prescribe vesting rules, but to specifically exempt medical plans from the scope of the rules.[13] Thus, Petitioners assert the remarkable boot-

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[13] "Automatic vesting [of medical plans] was rejected because the costs of such plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning fixed [pension] annuities are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and technology, and in-

strap argument that a pre-ERISA case decided in reliance on the policy choices made by Congress in enacting ERISA's *pension* vesting rules is evidence that pre-ERISA state law vested *medical* benefits.

C. Congress Consciously Chose to Reject Vesting of Retiree Medical Benefits Under ERISA and to Preempt State Law; Therefore, the Courts Are Not Free to Impose Vesting Requirements on Retiree Medical Plans.

Petitioners seem to think that this Court should grant *certiorari* simply because ERISA is a remedial statute and the Court of Appeals has denied their claims under ERISA. Petition pp. 12, 13. However, while ERISA generally expands the rights of employee benefit plan participants, its provisions reflect a careful balancing between the interests of participants and employee benefit plan sponsors.[14]

Congress enacted ERISA only after years of careful study. *Nachman Corp. v. P.B.G.C.*, 446 U.S. 359, 361-362 (1980); *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. 504, 510 (1981). Yet, there is no mention in ERISA's legislative history of the existence of Petitioner's alleged medical benefits vesting rule. It is preposterous to suggest, as Petitioners have, that Congress would overrule a "well-established" common law vesting rule without note or comment in the voluminous history of its deliberations and study in enacting ERISA.

However, even if Petitioners' mistaken assertion — that before ERISA medical benefits vested at retirement in some

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creases in the costs of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs." *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988).

[14] "If employers respond to more comprehensive coverage, vesting and funding rules by decreasing benefits under existing plans or slowing the rate of formation of new plans, little if anything would be gained from the standpoint of securing broader use of employee pensions and related plans." H. R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4682.

states regardless of the terms of any written plan — is correct, this case raises no unanswered federal question concerning the continued application of the rule after ERISA. Congress answered the question of whether medical benefits would be required by law to "vest" when it enacted ERISA § 201, 29 U.S.C. § 1051 (1982):

> This part [requiring vesting of "accrued benefits" under employee benefit plans and forbidding amendments which reduce vested "accrued benefits"] shall apply to any employee benefit plan described in section 4(a) (and not exempted under section 4(b)) *other than* —
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> (i) an employee welfare benefit plan.[15] (Emphasis supplied).

H.R. Rep. No. 807 defines the accrued benefits which are required to vest under ERISA as follows:

> Under the committee bill, the vested employee is protected in his rights to all, or a certain percentage, of his "accrued benefit."
>
> * * *
>
> The term "accrued benefit" refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance, which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately.

H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News at 4726; *see also* H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5054.

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[15] Petitioners concede the post-retirement medical program at issue in this case is an employee welfare benefit plan. Petition, p. 5 n.5. *See*, ERISA § 3(1), 29 U.S.C. § 1002(1) (1982).

Thus, Congress explicitly considered and rejected the application of vesting requirements to employee welfare benefit plans. These explicit statements of legislative intent are a far cry from the Congressional "silence" alleged in the Petition (p. 13).

> '[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.' *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981). 'The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.' *California v. Sierra Club*, 451 U.S. 287, 297 (1981).

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 145 (1985).[16]

Next, to eliminate any lingering doubts about the continued application of state common or statutory law to employee welfare and pension benefit plans, Congress declared any and all such state laws preempted by ERISA "... insofar as they may now or hereafter relate to any employee benefit plan ..."[17]

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[16] This Court has consistently rejected suggestions that it should disregard explicit statutory language to achieve some purpose deemed consistent with a perceived Congressional intent: "Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided." *Commissioner v. Asphalt Prod. Co.*, 482 U.S. 117, 107 S.Ct. 2275, 2278 (1987); *Commissioner v. Gordon*, 391 U.S. 83, 93 (1968).

[17] There is no doubt that a state common law vesting rule would "relate to" a retiree medical plan within the meaning of § 514(a). *Metropolitan Life Ins. Co., v. Massachusetts*, 471 U.S. 724, 739 (1985) (state law requiring additional benefits not provided by a medical plan relates to the plan and is preempted unless saved by insurance law exception); *See also, Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).

ERISA § 514(a), 29 U.S.C. § 1144(a) (1982).[18] Congress explained its preemptive intentions as follows:

> Finally, it is evident that the operations of employee benefit plans are increasingly interstate. The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws.

S. Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4865.[19] *See also, Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 523 (state law indirectly requiring an ERISA plan to provide greater benefits than provided under the plan terms is preempted); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 96 (1983) (state human rights law is preempted; "[t]he breadth of § 514(a)'s pre-emptive reach is apparent from that section's language."); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 739 (1985) ("The pre-emption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements."); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (state common law which would expand the relief obtainable by plan participants in ERISA suits is preempted); *Mackey v. Lanier Collection Agency & Service, Inc.*, 108 S.Ct. 2182, 2185 (1988) ("[W]e have virtually taken it for granted that state laws which are 'specifically

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[18] Exceptions to the broad preemptive scope of ERISA § 514(a) are provided for state insurance, banking, and securities laws. ERISA § 514(b), 29 U.S.C. § 1144(b) (1982). However, petitioners do not argue that their common law vesting rule arises under state insurance, banking, or securities laws and it is clear that none of the exceptions applies. *See, Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41. (State common law providing extra-contractual relief to ERISA plan participants is not saved by the insurance law exception).

[19] The legislative history of ERISA § 514(a) is succinctly recounted by the Court in footnotes 18, 19, and 20 of the Court's opinion in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 98-99.

designed to affect employee benefit plans' are pre-empted under § 514(a)").

Indeed, this Court has recognized that, while "ERISA imposes upon pension plans a variety of substantive requirements . . . [i]t does not regulate the substantive content of welfare-benefit plans." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 732. Instead, it reserves the determination of the substantive content of a welfare benefit plan for the plan sponsor. *Id.* at 739.[20]

Despite these explicit authorities, Petitioners ask this Court to grant their petition and determine whether pre-ERISA state common law from Minnesota, Wisconsin, and Ohio should be applied to regulate the substantive content of an ERISA medical program administered in Tennessee covering retirees in almost every other state. This is precisely the question Congress answered when it enacted § 514(a) and this Court has consistently rejected attempts to narrow the scope of § 514(a), especially when the state law at issue would impose requirements not contemplated by Congress.

Congress' answer to the question of whether medical benefits vest under ERISA or by operation of state law is crystal clear. They do not vest by operation of ERISA and any state law requiring such vesting is preempted; therefore, they vest, if at all, only by the express terms of the governing plan documents.[21] This, of course, is exactly what the Courts of

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[20] In *Metropolitan*, the Court held that a state law regulating the substantive content of a medical insurance program was "covered by ERISA's broad pre-emption provision set forth in § 514(a)." *Id.* at 739. The Court found the state law saved from preemption by the exception for laws regulating insurance. ERISA § 514(b) 29 U.S.C. § 1144(b) (1982). However, the insurance exception does not apply to Petitioners' common law vesting rule. *See* n. 18, *supra*.

[21] Congress emphasized the primacy of plan documents in determining a participant's entitlement to benefits under ERISA by requiring that employee benefit plans be maintained in writing (ERISA § 402(a) 29 U.S.C. § 1102(a) (1982)) and administered in accordance with their terms. ERISA

Appeals have held without exception and what the Court of Appeals held in this case. *See*, pp. 6, 7 *supra*, Ptnr. Apx. A, A-18, A-19. Therefore, the Court of Appeals' decision raises no important federal question requiring the Court's review.

II. THERE IS NO DISAGREEMENT AMONG THE CIRCUITS OVER THE PROPER CONSTRUCTION OF RETIREE MEDICAL PLANS.

Petitioners allege without any support that "[t]he Sixth Circuit's interpretation of the plan at issue in this case is inconsistent with that of other Circuits which have applied general insurance law to the interpretation of ERISA plans" Petition p. 9.[22] In fact, the Court of Appeal's approach to the plan documents in this case is in complete accord with the approach adopted by every other circuit which has been called upon to interpret a retiree medical program.[23]

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§ 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (1982). Ptnr. Apx. A, A-24-5. It would certainly be odd for Congress to include in ERISA's regulatory scheme the requirement that a written employee benefit plan "... provide a procedure for amending such plan ..." if Congress intended that the written procedure could be voided by the courts under state common law. ERISA § 402(b)(3).

[22] Petitioners also state "the Sixth Circuit expressly disapproved of the Third Circuit's actual application of the insurance law principles in [*Northeast Department ILGWU Health & Welfare Fund, Teamsters Local Union No. 229 Welfare Fund*, 764 F. 2d 147, (3d Cir. 1985)]." What the Sixth Circuit actually said was: "To the extent that dicta in the ILGWU decision suggest that escape clauses in single employer plans are automatically invalid, we respectfully disagree." (Ptnr. Apx. A, A-30). Even if this passing comment could be deemed "disagreement" it provides no support for the Petition because it is confined to an issue that has nothing to do with the plan interpretation challenged by Petitioners. Moreover the "escape clause" issue has long since become moot. "... Subsequent to entry of the order appealed from in this case ... the American General welfare plan was amended to eliminate the escape clause of which plaintiffs had complained..." (Ptnr. Apx. A, A-30).

[23] See the cases cited herein on pages 6 and 7. In fact, the Sixth Circuit has been accused of being more favorable to retirees than other circuits in its construction of retiree medical plans. *See Anderson v. Alpha Portland Indus.*,

Where then is the need to resort to state law? As the authorities cited by Petitioners clearly state, reference to state law is appropriate only when the state law is "compatible with national policy" and when "there is little federal law to which the court may turn for guidance." *Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 157, n. 18 (1985).

Here the opposite is true. In the face of an abundance of federal statutory and common law rejecting both their common law vesting rule and their artificial "reasonable expectations" construction rule, Petitioners point to only one decision which they claim applied the doctrine of reasonable expectations "... to limit policy provisions which, if read literally, would largely nullify an insurance policy ..." Petition, p. 11 citing *Van Orman v. American Ins. Co.,* 680 F.2d 301 (3d Cir. 1982). This statement is utterly baseless.

In *Van Orman*, the court ruled that, in view of its denial of the participants' claims, it could "assume, without deciding, that New Jersey [insurance] law controls." 680 F.2d at 308, *see also, id.* at 306.[24] The court went on to find the language of the governing (pension) plan documents controlling and rejected the participants' claims that the plan should be reformed to reflect their reasonable expectations.[25]

Indeed, when the *Van Orman* Court was called upon by the participants to adopt as federal common law under ERISA a

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Inc. 836 F.2d 1512, 1517 (8th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3565 (U.S. Feb. 27, 1989) (No. 87-2022).

[24] Respondents are aware of no decision adopting under federal ERISA common law "the doctrine of reasonable expectations." The *Van Orman* court clearly declined to adopt the doctrine under ERISA.

[25] "As a matter of logic, we find it difficult to perceive how plaintiffs' expectations would be frustrated by the defendants' retention of the surplus if nothing in the booklets and letters led them to expect that a surplus might arise." *Van Orman,* 680 F.2d at 310.

rule that would override the written terms of the plan, it had this to say:

> We believe that Congress' authorization of the creation of a federal common law of pension plans must be considered in light of the comprehensive nature of the statute. Where Congress has established an extensive regulatory network and has expressly announced its intention to occupy the field, federal courts will not lightly create additional rights under the rubric of federal common law.
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> * * *
>
> We are particularly reluctant to fashion a federal common-law doctrine of unjust enrichment when such a right would override a contractual provision.
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> * * *
>
> The Supreme Court has emphasized the primacy of plan provisions absent a conflict with the statutory policies of ERISA.

Id. at 311-12.

In this case, the Court of Appeals devoted no less than thirteen pages (Ptnr. Apx. A, A-9 through A-21) of its thirty three page Slip Opinion to an exhaustive analysis of the numerous documents given to Petitioners describing the medical benefits program concluding:

> Nowhere in that or any other employee publication — or in any memorandum, letter, brochure, report, or other written document, as far as we have been able to ascertain after a careful search of the record — did the company ever promise any employee that all premiums for post-retirement medical coverage would be irrevocably "paid up" upon the employee's retirement. (*Id.*, A-21).

Application of the "doctrine of reasonable expectations" would yield exactly the same result as the Court of Appeals' decision in this case. Petitioners' request that this Court grant *certiorari* and uphold their "reasonable expectations" is simply a request to second-guess the Court of Appeals' conclusion based upon its unchallenged factual findings.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX

American General Corporation owns the following subsidiaries, which are involved in the joint ventures listed below:

AGC Resources, Inc.
- Highland Resources, Inc.

American General Investment Corporation
- Appelt Prop. No. 1, Ltd.

American General Life & Accident Insurance Company
- Charterhouse Mezzanine Fund, L.P.
- Fulcrum II, L.P.
- Fulcrum III, L.P.
- Institutional Venture Partners, L.P.
- Institutional Venture Partners, II, L.P.
- Morgan Stanley Leveraged Mezzanine Fund, L.P.

American General Life Insurance Company
- American General Health Club

American General Life Insurance Company of Delaware
- America Tower
- Cypress Crossing Venture
- Mosbacher — A.G. Company

American General Life Insurance Company of New York
- Highland Resources, Inc. 1984
- One Park Place Associates

American General Realty Investment Corporation
- American Avia Associates — KCI
- American Avia Associates — SEA
- American Avia Associates I
- American Fieldstone Venture
- American Newland Associates
- Boone-Southern
- Carlton Arms of Egypt Lake
- Charter Associates
- Cinco Ranch Venture
- Cutten Associates
- Cypress Associates
- Deer Valley Industrial Center

Glencairn Village
Hickory Downs Venture
Hickory Holly Venture
Hope Valley Venture
Jackrabbit Venture
Koll/Intereal Phoenix
Langham Associates
The Meadows Venture
Newmarket Venture
One Arlington Center
Pebble Creek Associates
Pecan Grove Associates
Sammis Diamond Bar II
Sammis Diamond Bar III
Treaschwig Associates
West Georgia Commons Associates

California-Western States Life Insurance Company
America Tower
Cal-Mira Mesa, Ltd.
Cal-Sorrento, Ltd.
Sunrise Mall Associates
Vagabond Glendale Motor Hotel
Vagabond Sunnyvale Motor Hotel
Warburg-Pincus LTD.

Georgetown Realty, Inc.
Lake Wylie

Gulf Equities
Parklawn Center
Shirley Industrial

Gulf Village, Inc.
Wharfside II

GULFCO Capital Management, Inc.
Soujourn/Westgrove Off/Serv Bldg.

Hadco, Inc.
Columbia Square
Duo Mercatum

Joventex Corporation
- Camino Real Apartments

Knickerbocker Corporation
- American Health Club Venture
- STEA Limited Partnership I

Life and Casualty Insurance Company of Tennessee
- Alamo II
- America Tower
- American General Health Club
- Blackstone Capital
- No. 1 Beach Street

Rylis Realty Company *
- Cinco Ranch Venture
- Columbia 205 Commerce Center
- Fairbanks Associates
- Glencairn Village
- Jackrabbit Venture
- Overlake Commercial Center
- Riverbrook Associates

Tennessee Vintage Corporation
- Vintage Faire Associates